Supreme Court, U.S.
FILED

99 945 DEC 3 - 1999

OFFICE OF THE CLERK

No. 98-

IN THE
Supreme Court of the United States

October Term, 1999

MARVIN L. PULLMAN

Petitioner

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

George Z. Petros
Counsel of Record
5849 Allentown Road
Camp Springs. MD 20746
(301) 423-1000

QUESTIONS PRESENTED

I. The Defendant was charged with conspiracy to defraud the United States for his alleged participation with others, when taxpayers, (not the Defendant but Co-Defendants, Ronald and Marilyn Kerkvliet and Kenneth Bigalk), sent the Internal Revenue Service fictitious Montanan Freeman Money Orders as payment on disputed tax assessments.

QUESTION PRESENTED: WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS HOLDING THAT THE DOCTRINE OF STRICTISSIMI JURIS DID NOT APPLY IN DETERMINING WHETHER THE GOVERNMENT HAD PROVEN A SINGLE CONSPIRACY TO DEFRAUD THE UNITED STATES?

II. The instruments used by the involved taxpayers were instruments created by the Montana Freeman titled "Money Orders". The Defendant was charged under 18 U.S.C. 513 " counterfeited securities". The money orders were not made to imitate someone else's, or some entity's legitimate, instruments, but were made to be someone's misguided belief that they could make a U.C.C. instrument on an account opened but not funded at a banking institution.

QUESTION PRESENTED: WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS HOLDING THAT THE MONTANA FREEMAN MONEY ORDERS DO CONSTITUTE "COUNTERFEIT SECURITIES UNDER THE DEFINITION OF 18 U.S.C. § 513 AND ARE NO GOVERNED BY 18 U.S.C. § 514 "FICTITIOUS INSTRUMENT".

III. The Defendant was tried on several counts, the main count being a conspiracy to defraud the United States. The

gravelman of the government's claim was the use of Montana Freeman fictitious bank money orders and sending them to the Internal Revenue Service as a form of payment on disputed tax obligations. In all instances produced during the evidence at trial, the taxes claimed to be owned were incorrect. At sentencing the Defendant's guideline calculation was derived from the inclusion of Montana Freeman money orders which were never used, used privately but replaced with proper tender, not forwarded to any agency of the Untied States, and in one instance tendered to a local government for deposit as a bond. Most of these instruments were never even deposited by the receiptant.

Question Presented:

WHETHER IT IS A VIOLATION OF DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA TO USE A GROSS LOSS CALCULATION FORMULA IN A CONSPIRACY CASE WHEN THE CLAIMED LOSS WAS NOT LIMITED TO THE CONSPIRACY NOR POSSIBLE AS AN ACTUAL LOSS?

IV. At trial the Defendant, Marvin Pullman, elected to testify on his own behalf. During the course of his testimony he claimed to have made three visits to the Montana Freeman Compound and on the last of these visits he claims to have been escorted off the compound at gunpoint. Others who were present corroborated this testimony. After conviction the government put the Defendant on notice that it would seek enhancement of the Defendant's sentence under United States Sentencing Commissions Guidelines 3C1.1. The government claimed that part of the Defendant's testimony was false. At sentencing the government called one witness and produced audio tapes evidencing at least

part of that visit was not confrontational. The Court thereby found the Defendant had committed perjury and enhanced his sentencing accordingly.

Question Presented for Review:

WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE TO PERMIT A COURT TO ENHANCE A DEFENDANT'S SENTENCE UNDER UNITED STATES SENTENCING COMMISSIONS GUIDELINES MANUAL 3C1.1 (NOVEMBER, 1998) BASED UPON ALLEGED PERJURY, WHEN THE DEFENDANT STATEMENTS WERE CORROBORATED BY OTHERS AND MORE THAN ONE INTERPRETATION OF FACTS COULD BE PERMISSIBLE DRAWN?

PARTIES TO THE PROCEEDINGS

Marvin Pullman was a party at the District Court level. At the time of the indictment Co-Defendants, Milton Bigalk, Kenneth Bigalk, Ronald Kerkvliet and Marilyn Kerkvliet were parties to the proceedings. Ronald and Marilyn Kerkvliet entered pleas prior to trial. Kenneth Bigalk entered into a plea arrangement after the commencement of trial wherein he testified for the government after entering a plea to Count I of the indictment. Milton Bigalk proceeded in proper person, filed an appeal from his conviction, said appeal was dismissed without argument. His appeal was not joined with that of Marvin Pullman.

The United States of America, through the offices of the United States Attorneys Office for the District of Minnesota, was a party at the District Court level and on the Appellant level.

The Petitioner is properly listed in the caption, and is not a corporation for purposes of Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDINGS..... iv

TABLE OF AUTHORITIES.....vii

OPINIONS BELOW 1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....7

I. WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE IN ORDER TO ESTABLISH A CONSTITUTIONAL BASIS FOR REVIEW OF A CONSPIRACY WHICH IS BASED ON PROTESTS AGAINST GOVERNMENT ACTIONS, WHICH ACTIONS THE GOVERNEMNT THEN PROSECUTES AS A CONSPIRACY.....9

II. THE EIGHTH CIRCUIT ERRED IN ITS RULING OF THE STATUTORY CONSTUCTION OF 18 U.S.C.§ 513 AND ITS FAILURE TO CONSIDER THE LEGISLATIVE HISTORY OF CONCERNING THE ENACTMENT OF 18 U.S.C. § 514.....18

III. WRIT OF CERTIORARI SHOULD BE GRANTED TO ELIMINATE CONFLICTING OPINIONS AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF LOSS CALCULATIONS, WHICH CONFLICTS AMOUNT TO A DENIAL OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAW.....23

IV. IS IT CONSTITUTIONALLY PERMISSIBLE TO ALLOW A 2 POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE ON THE BASIS OF CONFLICTING BUT NOT MUTALLY EXCLUSIVE TESTIMONY?.....28

CONCLUSION.....30

TABLE OF AUTHORITIES

Cases	Page
Akins v United States, 439 F2d 175, 194 Ct Cl 477 (1971).....	23
Berger v United States, 295 U.S. 78 (1934).....	18
Braverman v. United States, 317 U.S. 49 (1942).....	16
Brock v Writers Guild of America, West Inc 762 F2d 1348 (9th Cir 1985).....	23
Continental Ins. Co v Simpson, 8 F2d 439 (4th Cir 1925)	22
Dennis v. United States, 341 U.S. 494.....	12
Dennis v. United States, 384 U.S. 855 (1966).....	12, 17
Hammerschmidt v. United States, 265 U.S. 182 (1924).....	2, 15, 17
Kotteakos v. United States, 328 U.S. 750 (1946)	.13, 14, 18
Krulewitch v. United States, 226 U.S. 440 (1949)....	12,16
Ianelli v. United States, 420 U.S. 770 (1975).....	16
Mclean v United States, 226 U.S. 374 (1912)..... .	23
Nota v. United States, 367 U.S. 290, 299-300 (1961).....	10
Pullman v. United States, 187 F3rd 816 (8th Cir. 1999).....	4

Scales v. United States, 367 U.S. 203 (1961)..... 10

Scythes v. Webb, 307 F2d 905 (7th Cir. 1962)..... 10

Steuer v United States, 207 Ct Cl 282 (1975)..... 23

Tanner v. United States, 483 U.S. 107 (1987)..... 12

United States v Alpert, 28 F3d 1104 (11th Cir 1994)..... 30

United States v Banta, 127 F3d 982 (10th Cir 1997)..... 25

United States v Belletiere, 971 F2d 405 (3rd Cir 1992).... 30

United States v Blakey, 960 F2d 996 (11 Cir 1992)
Appeal after new trial 14 F3d 1557..... 22

United States v. Bledsoe, 674 F2d 647 (8th Cir. 1982)
cert denied 459 U.S. 1040 (1982)..... 18

United States v. Caldwell, 989 F2d 1056 (9th Cir. 1993)....15

United States v Coffman, 94 F3d 330 (7th Cir 1996).... 24

United States v. Davis, 882 F2d 1334 (8th Cir. 1989)
Cert. denied, 117 S. Ct. 1008 (1997).....13, 14

United States v Davis, 888 F2d 283 (3rd Dir 1989)
Cert granted 494 U.S. 1026, affirmed 498 U.S. 103..... 22

United States v Defeo (2nd Cir 1994)..... 30

United States v Delia, 749 F. Supp 500 (S.D.N.Y.)
Affirmed 944 F2d 1010..... 22

United States v. Dellinger, 472 F2d 340
(7th Cir. 1972), cert denied 410 U.S. 970 (1973)..... 10

United States v. Dodge, 538 F2nd 770 (8th Cir. 1976)... 10

United States v. Dunnigan, 507 U.S. 87 (1993)..... 9, 29

United States v Ensminger, 174 F3d 1143 (10th Cir 1999) 24

United States v. Falcone, 109 F2d 579 (2nd Cir.)
Aff'd 311 U.S. 205 (1940)..... 12

U.S. v Galbraith, 20 F3d 1054 (10th Cir 1992)..... 24

United States v Gardner, 998 F2d 82 (9th Cir 1993)..... 30

United States v. Giunta, 925 F2d 758 (4th Cir. 1991).....16

United States v. Grayson, 438 U.S. 41 (1978)..... .9

United States v Hansen, 772 F2d 940 (D.C. Cir 1985)... 22

United States v Hilliard, 31 F3d 1509 (10th Cir 1994)..... 29

United States v Holiusa, 13 F3d 1043 (7th Cir 1994)..... 25

United States v Ismoila, 100 F3d 380 (5th Cir 1996).... 24

United States v Johnson, 993 F2d 1358 (8th Cur 1993)..... 26

United States v. Jones, 880 F2d 55 (8th Cir. 1989).....13, 14

United States v. Jones, 765 F2d 996 (11th Cir. 1985) 16

U.S. v Kahn, 969 F2d 218 (6th Cir 1992)..... 23

United States v. Lennick, 18 F3d 814 (9th Cir. 1994)..... . 16

United States v. Markiewics, 978 F2d 786

(2nd Cir. 1991)..... 11

United States v. Maza, 93 F3d 1390 (8th Cir.).....13, 14

United States v. McCarthy, 97 F3d 1562 (8th Cir.), Cert. denied, 117 S. Ct. 1011, and cert. Denied, 117 S. Ct. 1284 (1997).....14

United States v. Montour, 944 F2d 1019 (2nd Cir. 1991) 11

United States v Orton, 73 F3d 331 (11th Cir 1996)..... 25

United States v Parker, 25 F3d 442 (7th Cir 1994)..... 29

United States v Perdemo, 927 F2d 111 (2nd Cir 1991)..... 28

United States v. Perlaza, 818 F2d 1354 (7th Cir.) cert. Denied 484 U.S. 861 (1987).....16

United States v. Rabinowich, 238 U.S. 78 (1915)..... 12

United States v. Red Feather, 541 F2d 1275 (8th Cir. 1976)..... 10

United States v Reed, 49 F3d 895 (2nd Cir 1995)..... 30

United States v. Regan, 940 F2d 1134 (8th Cir. 1991).....14

United States v Robinson, 978 F2d 1554 10th Cir 1992)... 30

United States v Rogers, 9 F3rd 1025 (2nd Cir 1993)..... 20

United States v Romulus, 949 F2d 713 (4th Cir 1991) Cert denied 503 U.S. 992 (1992)..... 30

United States v. Rosnow, 977, F2d 388 (8th Cir. 1992).....14

United States v Santiago, 906 F2d 867 (2nd Cir 1990)..... 28

United States v Smith, 62 F3d 641 (4th Cir 1995)..... 29

United States v Strozier, 981 F2d 281 (7th Cir 1992)..... 26

United States v Studevent, 116 F3d 1559 (D.C. Cir 1997) 24

United States v Tabares, 951 F2d 405 (1st Cir 1991)..... 30

United States v. Thomas, 8 F3d 1552 (11th Cir. 1993).....16

U.S. v Thomas, 54 F3rd 73 (2nd Cir 1995)..... 20

United States v Wells, 127 F3d 739 (8th Cir 1997)..... 25

United States v. Whitehorn, 710 F.Supp 803
(D.D.C 1989)..... 10

United States v Williams, 952 F2d 1504 (6th Cir 1991).... 30

United States v Willis, 940 F2d 1136 (8th Cir 1991)..... 29

United States v Wolfe, 71 F3d 611 (6th Cir 1995)..... 25

United States v. Zafiro, 945 F2d 881 (7th Cir. 1991)
aff'd 133 S. Ct. 933 (1993).....16

CONSTITUTIONAL AND STATUTORY PROVISONS

U.S.. Constitution, Amendment 1..... 2

U.S.. Constitution, Amendment 14..... 2

18 U.S.C. § 2..... 3, 7

18 U.S.C. § 371..... 3, 7, 12, 13

18 U.S.C. § 513 ..... 3, 7, 8, 18,19,20,21,22,23

18 U.S.C. § 514 ..... 3, 8,20,21,23

26 U.S.C. § 7212 (a)..... 3, 7

28 U.S.C. § 991..... 8

U.S.S.G. 2F1.1 2,3,8,23,24,25,26,27

U.S.S.G 3C1.1.....2, 3, 30

OTHER AUTHORITIES

United States v O'Razvi (Unreported Decision) (S.D.N.Y.) 1998 WL 405048..... 20

Black's Law Dictionary, Revised 4th Edition West Publishing Company, 1972..... 19

No. 98-

IN THE

Supreme Court of the United States

October Term, 1999

MARVIN L. PULLMAN

Petitioner

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Marvin Pullman, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' published decision of August 13, 1999 is reported at 187 F3rd 816 (8th Cir. 1999) (Appendix A-1) (hereafter App.).

JURISDICTION

Judgment was entered on September 7, 1999 by the Court of Appeals affirming the judgment of the District Court, which had been entered on August 21, 1998 (App. A-15).

Jurisdiction of the Court is conferred under 28 U.S.C. sec.1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

The First Amendment to the U. S. Constitution provides as follows:

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the U. S. Constitution provides as follows:

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 513, See App 20
18 U.S.C. § 514, See App 22
U.S.S.G. 2F1.1, See App 18

Section 3C1.1 of the United States Sentencing Guidelines provides as follows:

Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

The Appellant Marvin Pullman was charged in 3 Counts of a 9-count indictment by the Grand Jury for the United States, District of Minnesota. The Defendant was charged in Count 1 with violations of 18 USC § 371 (Conspiracy to Defraud the United States); Count 6 with a violation of 18 USC § 513 (as aiding and abetting in the uttering and possession of a counterfeit security) and Count 8 with a violation of 26 Title 7212 (a) and 18 USC § 2 (corruptly endeavor to obstruct and impede the due administration of the Internal Revenue Service). The case came on for trial before the Honorable Ann D. Montgomery on March 10, 1998 and concluded on March 26, 1998 when the jury returned its verdict of guilty against the Defendant Pullman on Counts 1, 6 and 8. The Defendant came before the Honorable Ann D. Montgomery for sentencing on the 21st day of August, 1998. At the conclusion of the sentencing hearing Mr. Pullman was incarcerated having been sentenced to 60 months on Count 1, 70 months on Count 6 and 36 months on Count 8. The Court determined his sentence by charging him with enhancements for "loss" under USSG 2F1.1 in the amount of $3,113,090.00. Said calculation of loss included Montana Freemen Money Orders which were not presented to any agency of the United States Government and also included the Bigalk Money Orders despite his testimony that Pullman was not involved in the decision to forward those money orders to the Internal Revenue Service. The loss calculation also included unused money orders and in the instance of the one million dollar money order attempted to be used as a deposit with Dakota County, a money order not directed to the United States and one which was not to be used in any way other than as a deposit. The Court also assessed Mr. Pullman two (2) additional points for Obstruction of Justice, USSG 3C.1, on

the theory that his testimony at trial about a visit to the Montana Freeman Compound constituted perjury. Thereafter, a timely appeal was filed. The Eighth Circuit Court of Appeals affirmed the Judgment of the District Court in a reported opinion **Pullman v United States, 187 F3rd 816 (8th Cir. 1999)**.

The charges against Marvin Lewis Pullman arose after Mr. Pullman met an individual named Milton Bigalk (a Co-Defendant in the case) sometime in 1991). By 1992, Mr. Milton Bigalk had invited Pullman to attend a meeting in Canton, Minnesota. The meeting contained discussions concerning tax problems and common law. After the meeting, unsolicited literature concerning the Internal Revenue Service was sent to Mr. Pullman. Thereafter, Pullman attended a meeting in Oklahoma, which dealt with setting up a common law court system. While he learned the system he never proceeded to become a formal member by an action called "quiet title".

Mr. Pullman first met Ronald and Marilyn Kerkvliet (Co-Defendant in the case) at a common law meeting in Dover, Minnesota, perhaps in 1993 or as late as 1995. In April of 1995 Pullman, together with Marilyn Kerkvliet, traveled with Milton Bigalk to Montana to attend a meeting put on by the Montana Freeman. The Montana Freemen would hold seminars regarding the common law system and their certified money orders.

After the attendance at the Montana meeting Marilyn Kerkvliet and Ronald Kerkvliet used two Montana Freeman Certified Money Orders, sending them to the Internal Revenue Service as payment on a disputed tax assessment. One from Marilyn Kerkvliet dated April 26, 1995 (Government's Exhibit 1-2A; Tr VII 26-27) and the second from Ronald Kerkvliet (Government's Exhibit 1-2B Tr VII 28-29). The Kerkvliets did not testify at the trial of this case. However, there was evidence that the tax assessments were grossly erroneous. They were called by the Defendant but refused to testify, invoking their rights under the Fifth Amendment to the Constitution of the United States. Marvin Pullman testified

that he did not know of the Kerkvliets' sending the Certified Money Orders to the Internal Revenue Service until after the act had occurred. At some time in the late summer of 1995, Marilyn and Ronald Kerkvliet traveled to Dakota County to place a common law notary on record and desired to post a common law bond with a one million dollar Certified Money Order. The Kerkvliets gave several documents to an employee of the Dakota County Treasurer-Auditor's Office at this time. One of the documents contains a notary of Marvin Pullman. There is no evidence that Pullman was with the Kerkvliets, in fact, the witness from Dakota County testified he never met Mr. Pullman and the Kerkvliets were alone. The documents and the Certified Money Order were never utilized in any manner and were returned to the Kerkvliets.

In May of 1995 Kenneth Bigalk sent the Internal Revenue Service a similar Certified Money Order. Kenneth Bigalk sent a second Certified Money Order in July of 1995. The Kenneth Bigalk use of Certified Money Orders was done for payment on contested tax assessments. The tax assessments had reached a claimed amount of $678,000.00. They were incorrect and Kenneth Bigalk's intention was to try to buy time.

Marvin Pullman first met Kenneth Bigalk in 1993. Kenneth Bigalk first came to use his services due to his tax problems. Pullman charged Kenneth Bigalk for his time and services. Mr. Pullman attempted to direct him to an attorney. Mr. Pullman did not direct, encourage, urge, agree or even know, until after the event, that Kenneth Bigalk sent Certified Money Orders to the Internal Revenue Service. Kenneth Bigalk, who became a government witness at the trial, testified that Pullman did not assist or know of his use of the Montana Freeman Money Orders until after he had sent them to the Internal Revenue Service. In fact, it was Marvin Pullman who got Kenneth Bigalk to file tax returns for the 1991 and 1992 years.

Pullman did assist Kenneth Bigalk in establishing a Trust called Venture Capital for the sole purpose of saving 50,000 laying hens. The establishment of the Trust was claimed by

the government to be a part of the criminal conspiracy to defraud the United States. IRS Agent Fristvold testified as to the timing of the establishment of the trust and only that more work would be required to secure a nominee lien. Kenneth Bigalk sent documents to the IRS titled non-statutory abatements. Pullman did witness the non-statutory abatement and there is some evidence to suggest the form came from his computer. There is no evidence that the non-statutory abatement had any effect on the government of the United States. Agent Fritsvold, in a simple statement, says he felt it threatened him financially.

Marvin Pullman was involved in an investment group known as Freemen and Associates. A group of fourteen (14) people pooled a small amount of money and deposited it in a bank account in Iowa, under the investment group name. The money would then be deposited in an off shore account. At the time of the formation of this group, the Kerkvliets, Milton Bigalk and other individuals, for a total of fourteen (14) individuals, were part of the group. Thereafter, Milton Bigalk was terminated from the group. Milton Bigalk began his own investment group. Kenneth Bigalk was never part of Freemen and Associates. Kenneth Bigalk made a small investment in Milton Bigalk's group but had no connection with Freemen and Associates.

The Kerkvliets also opened their own separate off shore account called Joy. The Kerkvliets were first charged and tried before the United States District Court for the District of Minnesota in case number Criminal 3-96-122 for their use of these same certified money orders on the charge of mail fraud and counterfeit securities. They were not at that time charged with conspiracy to defraud the United States and the Co-Defendants in this case, i.e., Marvin Pullman, Milton Bigalk and Kenneth Bigalk were not charged at that time.
The government brought the charges in this case after the first trial against the Kerkvliets, claiming that Marvin Pullman, Milton Bigalk, Ronald and Marilyn Kerkvliet and Kenneth Bigalk were involved in a criminal conspiracy to defraud the United States.

REASONS FOR GRANTING THE WRIT

Petitioner, Marvin Pullman, was sentenced to a total of seventy (70) months based on the jury's return of a guilty verdict on three counts of the indictment. The guilty verdicts having been returned on 18 U.S.C. § 371, conspiracy to defraud the United States; 18 U.S.C. § 513, as aiding and abetting in the uttering and possession of a counterfeit security; 26 U.S.C. § 7212 (a) and 18 U.S.C. § 2, corruptly endeavor to obstruct and impede the due administration of the Internal Revenue Service. The convictions result from the misguided protesting of highly inflammatory and grossly overstated tax assessments levied against the Kerkvliets and Kenneth Bigalk. In protest to the assessments of the Internal Revenue Service those Co-Defendants used Montana Freeman Money Orders as a purported payment on the contested assessments. Their actions were all done within the confines of a movement in the mid-west known as the "Common Law Belief". This group of people believed the laws of the United States could be rejected by removing themselves as a citizen by a process called "quiet title". Marvin Pullman became associated with a group of common law members in Minnesota which included the Kerkvliets, Kenneth Bigalk and Milton Bigalk (all Co-Defendants) in the District Court case. As misguided, illogical and wrongful as their beliefs may have been it also clearly also involved lawful activities. Lawful in the sense of disputing the grossly overstated tax assessments; lawful in the sense of peaceful protest and petitioning of grievances against the government; unlawful in the use of Montana Freeman money orders. However, these actions were not initiated or performed by Petitioner Pullman. His "crime" was in his misguided efforts to help them and thereby associate with them, not to defraud the United States but to assist the taxpayer in resisting both the false tax assessments and the efforts of the Internal Revenue Service to collect on those assessment, while attempting to resolve the dispute.

The Eighth Circuit affirmed the convictions, rejecting both the substantive legal arguments and summarily dismissing the technical, but important, technical sentencing guideline issues that result in the imposition of the seventy (70) sentence.

First, in reviewing the case the Eighth Circuit did not address the application of Strictissimi Juris as the proper standard for the review. The court dismissed the issue in a general statement including it with several of the other issues raised on appeal (App). However, it was an important issue in that, if applicable, the entire review of the evidence necessary to sustain a conviction of conspiracy to defraud the United States would be put to a higher standard. Given the facts involved in the Pullman case, which intermingles First Amendment rights, it is a matter of importance. This is highlighted by the numerous grass roots protest, in various forms, that arose in the 1990's over the manner in which the Internal Revenue Service treated taxpayers. The joining together in "Common Law" movements, while displeasing to many, is not however unlawful and is a basic liberty protected by the Constitution. The use of overbroad conspiracy theories to make unlawful constitutionally protected activity is chilling.

Second, 18 U.S.C. §514, to date, has been addressed only by the Eighth Circuit Court of Appeals decision in the Pullman case. The ruling of the Eighth Circuit would appear to leave citizens of the United States open to prosecution of both 18 U.S.C. § 513 and § 514 for the same acts. Clearly the intent of Congress must be given some weight and not dismissed as easily as the Eighth Circuit has allowed. In effect the ruling of the Eighth Circuit stands for the proposition that there was no need for the enactment of § 514.

Third, one of the very purpose of the United States Sentencing Guidelines, as set forth in 28 U.S.C. §991 is to provide for fairness and unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. The development of the case law among the Circuits has allowed a variance to exist

based on conflicting decisions regarding the proper calculations to be applied under USSG 2F1.1. Even within the same Circuit but varying from case to case there are differing opinions of the proper loss calculation. These conflicting decisions lend the creation of a violation of due process and equal protection of the laws. Different defendants are, if fact, receiving far different sentences for the same activities and conduct.

Fourth, this Court has addressed the issue of the constitutionality of the enhancement for Obstruction of Justice, i.e. alleged perjury, under USSG 3C1.1. see, **United States v Dunnigan**, 507 U.S. 87 (1993) and **United States v Grayson, 438 U.S. 41 (1978)**. However, in it opinion the *Dunnigan* Court expressed the firm conviction and belief that a proper determination that the accused had committed perjury served as the protector to assure that sections constitutionally. The Eighth Circuit has allowed this very enhancement to stand with out addressing the need to adhere to such a standard and has caused that which was feared to develop in fact, enhancement on the bases of a jury's non-belief in a defendant who elects to testify. The chilling effect on defendant's rights and one's guarantee to due process of law is lost when this enhancement is allowed based simply on conflicting, but not mutually exclusive, testimony.

If the very purpose of the United States Sentencing Guidelines is to be upheld and applied uniformity among the Circuits to guarantee Due Process and the Equal Protection of the Law then this case must be reviewed and reversed.

I. WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE IN ORDER TO ESTABLISH A CONSTITUTIONAL BASIS FOR REVIEW OF A CONSPIRACY WHICH IS BASED ON PROTESTS AGAINST GOVERNMENT ACTIONS, WHICH ACTIONS THE GOVERNEMNT THEN PROSECUTES AS A CONSPIRACY.

Strictissimi juris is a doctrine of law, which applies when the group activity out of which the alleged offense develops can be described as a bifarious undertaking, involving both legal and illegal purposes and conduct, and is within the shadow of the First Amendment. See **Nota v United States, 367 U.S. 290, 299-300 (1961); United States v Dodge, 538 F2d 770 (8th Cir. 1976) see footnote 16; Dissenting Opinion United States v Red Feather, 541 F2d 1275, (8th Cir 1976); United States v Dellinger, 472 F2d 340, 382 (7th Cir. 1972), cert denied 410 U.S. 970 (1973).** The First Amendment to the Constitution of the United States of America protects freedom of speech, peaceful assemblage and petition of grievances, among other rights. In this case the government has placed the "common law" system and that groups beliefs on trial. All of these acts appear to be clearly governed by and protected by the rights preserved to the citizens by the First Amendment. Whether we can accept or understand the extension of the right to groups, which advocate anti-government actions or movements, we must accept that it is a protected right. The right to associate with others to advocate political beliefs is constitutionally protected and it is not illegal to join groups advocating even violent overthrow of the government or to protest government action. See **Scales v United States, 367 U.S. 203, 230 (1961); Scythes v Webb, 307 F2d 905, 907 (7th Cir. 1962); United States v Whitehorn, 710 F. Supp 803 (D.D.C 1989)**. Much of the government's claim in the Pullman case was that the common law system advocates petitioning the government to remove oneself from being a United States citizen (Quiet Title actions) and that, therefore, it is reasonable to believe that Marvin Pullman believed it acceptable to file common law documents and take the common law position that one is not subject to taxes. The government therefore states that Pullman must have been part of the acts of the Kerkvliets and Kenneth Bigalk in sending Certified Money Orders to the IRS because that was part of the common law method.

When the ultimate objective of a group (i.e. the Common Law group) of which the defendant is a member or associate, is legal, but the means chosen to accomplish that end involved both legal and illegal activities, a court is to apply *strictissimi juris* to ensure that the defendant was personally involved with the illegal aspects of the group activity, **United States v Dellinger, (7th Cir) supra**. Under *strictissimi juris*, a court may satisfy itself that there is sufficient direct or circumstantial evidence of the defendant's own advocacy of and participation in the legal goals of the 'conspiracy' and may not impute the illegal intent of alleged coconspirators to the actions of the defendant, **United States v Markiewics, 978 F2d 786 (2nd Cir. 1991)**; **United States v Dellinger, (7th Cir)** ***supra***.

The purpose of the strictissimi juris standard of review is "to avoid punishing one who participates in an undertaking involving both legal and illegal purposes and who is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means". **United States v Dellinger (7th Cir.) supra at 392. Strictissimi juris (according to the strictest law)** is a standard applied in review the sufficiency of evidence in a criminal case "only under very special circumstances" **United States v Montour, 944 F2d 1019, 1024 (2nd Cir. 1991).**

Specially meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some of the participants to all others, **United States v Markiewics, (2nd Cir. 1991) supra**; **United States v Dellinger, (7th Cir) supra**.

Pullman believes that his association with the anti government groups, such as the Montana Freemen and the Minnesota Common Law system required the application of this standard to a review of the sufficiency of the evidence.

It is important that constitutional activity not be used as the "tar and feathers" by which ones lawful but unpopular actions

brand him as a conspirator or criminal. When that is likely then the doctrine of Strictissimi juris must be applied.

This Court long ago warned of the potential abuse the overboard application of the federal conspiracy law invited, see **Krulewitch v United States, 226 U.S. 440, 445 (1949); Dennis v United States, 341 U.S. 494 United States v Rabinowich, 238 U.S. 78 (1915)**. The Pullman case now serves as a perfect example of those warning.

> **The distinction between hearing about criminal misconduct and knowingly participating in such misconduct is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.** *Judge Hand in United States v Falcone, 109 F2d 579, 581 (2nd Cir) aff'd 311 U.S 205 (1940)*

This Court has held that the United States must be the target of a conspiracy to defray prosecution, **Tanner v United States, 483 U.S. 107, 128-32 (1987)**. Actions against private business (also logically state or local governments) have been deemed insufficient to support a conviction under 18 U.S.C. § 371. The first test, therefore, is whether there is evidence which supports actions having been taken against the United States or any federal governmental department or agency, **Hammerschmidt v United States, 265 U.S. 182, 188 (1924)**; **Dennis v United States 384 U.S. 855 (1966)**.

To meet this requirement the United States brought forth evidence that there was an effort, by some of the Defendants in this case, to interfere with the functions of the Internal Revenue Service. The direct actions are alleged to have been taken by Kenneth Bigalk or by Marilyn and Ronald Kerkvliet. The actions of this Defendant, Marvin Pullman, are supposed to be in the form of his assistance. The United States produced evidence that Kenneth Bigalk sent to the Internal

Revenue Service "certified money orders" as an effort to pay the disputed assessments and that he used the United States mails in doing so, alleging that constituted mail fraud. The United States also presented evidence that a Venture Capital Trust was set up and claimed its purpose was to avoid a tax levy. The government also claimed that an off shore investments of Kenneth Bigalk was done with the intent to deprive the Internal Revenue Service of the ability to seize that money or collect the disputed tax assessment. The government also presented evidence of actions of the named co-conspirators Marilyn and Ronald Kerkvliet. That evidence consisted of the Kerkvliet's actions in sending the Internal Revenue Service "certified money orders" for payment of disputed tax assessments. The government also claimed that off shore investments by the Kerkvliets was done with the intent to deprive the Internal Revenue Service of the ability to seize that money or collect the disputed tax assessment. In summary, this is the evidence of actions against the United States.

The Eighth Circuit found that these acts in fact constituted evidence of a violation of 18 U.S.C. §371. In essence the appeals court allows the criminalization of association to any degree whatsoever with the main offenders. This decision ignores completely the past warnings of this Court.

The law is clear that and is well established, that if after considering the totality of the circumstances, the nature of the activities performed and the participants involved, and viewing the evidence in the light most favorable to the verdict if the Appellant Court finds a single conspiracy did not exist then it can reverse the jury's verdict. See **United States v. Jones, 880 F.2d 55, 66 (8th Cir. 1989) (citing Kotteakos v. United States, 328 U.S. 750, 755-56 (1946)**. A single conspiracy is composed of individuals sharing common purposes or objectives under one general agreement.'" **United States v. Maza, 93 F.3d 1390, 1398 (8th Cir.) (quoting United States v. Davis, 882 F.2d 1334, 1342 (8th Cir. 1989)), cert. denied, 117 S. Ct. 1008 (1997)**. If the jury finds "one overall agreement to commit an illegal act, the evidence

establishes a single conspiracy." **United States v. Regan, 940 F.2d 1134, 1135 (8th Cir. 1991)**. An overall agreement can be inferred when "the participants shared a common aim **United States v. Maza, 93 F.3d 1390, 1398 (8th Cir.) (quoting United States v. Davis, 882 F.2d 1334, 1342 (8th Cir. 1989)), cert. denied, 117 S. Ct. 1008 (1997)** or purpose and mutual dependence and assistance existed." A variance results where a single conspiracy is charged, but the evidence at trial shows multiple conspiracies. See **United States v. Jones, supra (8th Cir. 1989) supra, Kotteakos v. United States, supra**. In determining whether a variance exists, the courts consider the totality of the circumstances, including the nature of the activities, the location and time frame in which the activities were performed, and the participants involved. See **United States v. McCarthy, 97 F.3d 1562, 1571 (8th Cir.), cert. denied, 117 S. Ct. 1011, and cert. denied, 117 S.Ct. 1284 (1997), United States v. Rosnow, 977 F2d 388 (8th Cir 1992)**.

What the Eight Circuit has allowed to stand in this case, however, is a conviction based on multiple acts with no nexus between the parties as it pertains to the conduct upon which the government bases its claim of a single criminal conspiracy. A quick review clearly demonstrates this point.

(1) The Government introduced the act of Marilyn and Ronald Kerkvliet in forwarding to the Internal Revenue Service "certified money orders" as payment for contested tax assessments. There was no evidence that this was done with the knowledge or urging of Marvin Pullman. The government's evidence, in fact, established that Marilyn Kerkvliet was at the Montana Freeman Compound at a time the use of certified money orders was discussed to hundreds of people. Pullman was only one of many who was also present. There is no evidence to establish that Pullman knew of the Kerkvliet's tax assessment at the time they used the "certified money orders". There is no evidence that Pullman assisted the Kerkvliet's in any manner until after their conviction in the related case.

(2) The Government's own witness, Kenneth Bigalk, testified that Marvin Pullman did not provide him with the "certified money orders" he used as payment on his contested tax assessment. Furthermore, Kenneth Bigalk testified that Pullman did not even know he (Kenneth Bigalk) had used or sent those money orders at the time that he did so.
(3) The Government introduced evidence to establish that Pullman's assistance of Kenneth Bigalk was for payment of money, i.e. a paralegal/client relationship.
(4) The Government's evidence of Milton Bigalk and Marvin Pullman being involved in an Abatement seminar, and even the misguided use of common law abatements, was not tied into a single agreement of the Defendants and, furthermore, is not evidence of any criminal wrong doing. It must be noted **"the defraud clause is limited to wrongs done by deceit, craft, or trickery" (emphasis my own)**, **Hammerschmidt, supra**. Obstructing governmental function in other ways-for example, by violence, robbery **or advocacy of illegal action-(emphasis my own)** cannot constitute defrauding. Nor can action which is merely agreeing to make the government's job harder, **United States v Caldwell, 989 F2d 1056 (9th Cir. 1993)**.
(5) The activities of the Kerkvliets and Kenneth Bigalk involved using Montana Freeman "certified money orders" by sending them to the Internal Revenue Service for disputed tax assessments, their actions took place in two wholly separate locations and were separated by months.

The Eighth Circuit, in fact, did exactly what the fear of an overly board prosecution under the conspiracy statute might lead to; it confused the evidence and held separate acts, performed at different time and in a completely different context, to be evidence of the conspiracy charged in the present case. At page 6 of it's opinion the court pointed to a statement attributed to Pullman at a Montana Freeman seminar "If we run [of money orders], we'll just go make some more" as evidence of Pullman knowledge of the criminal use of these type of instruments. However, the statement used by the Eighth Circuit was not one attributed to Pullman at any

meeting attended as part of this prosecution. It was a statement admitted over objection, which objection was based on a potential prejudicial effect the admission might have to the case being prosecuted, that supposedly took place at some other time and was referring to some matters on the east coast.

The evidence is totally devoid of any agreement between Kenneth Bigalk and the Kerkvliets. What the evidence did not show was that these acts were connected in any way. The government attempts to prove conspiracy through common associations. Specifically they introduced a mountain of "common law documents" (over objections) clearly showing these people all were, at one time or another, members of the "common law system". The government, however, conceded that the "common law system" was not on trial and that it is not illegal to participate in the common law system.

Knowledge, approval or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to accomplish a specific illegal objective is not sufficient to support a conspiracy conviction. **United States v Perlaza, 818 F2d 1354 (7th Cir.), cert denied, 484 U.S. 861 (1987)**. The agreement element is not proven by mere knowledge of illegal activity, by mere association with a conspirator, or by mere presence at the scene of conspiratorial activity. **United States v Thomas, 8 F3d 1552 (11th Cir. 1993); United States v Zafiro, 945 F2d 881 (7th Cir 1991) aff'd 113 S.Ct. 933 (1993)**.

Evidence of an agreement to engage in the criminal act is essential. The distinguishing feature of the offense of conspiracy is the agreement to accomplish a criminal objective, **Ianelli v United States, 420 U.S. 770, 777 (1975); Braverman v United States, 317 U.S. 49, 53 (1942)**. Failure to prove an agreement is fatal to a conspiracy charge. ***See*** **Krulewitch v United States, 336 U.S, 440, 448 (1949)** (Jackson J., concurring). To prove an agreement, the prosecution must show that the conspirators agreed on the "essential nature of the plan". **United States v Jones, 765 F2d 996 (11th Cir. 1985); United States v Lennick, 18 F3d 814 (9th Cir 1994); United States v Giunta, 925 F2d 758 (4th**

Cir. 1991). In this case there must have been not only evidence of an agreement (and there was none) but further the evidence had to be of an agreement to defraud the United States. **Hammerschmidt *v* United States, supra; Dennis v United States supra**.

To allow the Eighth Circuits ruling to stand is to allow a lessening of the standard of proof required under the case law of this Court.

The government successfully associated Pullman with this Co-Defendants and thereby allowed the assumption of an agreement, by maintaining that both the Kenneth Bigalk IRS transactions and the Kerkvliet's IRS transactions had a common ingredient "the Montana Freeman Certified Money Orders. That Kenneth Bigalk, the Kerkvliets, and Milton Bigalk joined in the common law system. That there is evidence of Marvin Pullman's association with Common Law practices by his execution of common law documents. That Milton Bigalk, Marilyn Kerkvliet and Pullman all went to Montana together. That Pullman and the Kerkvliets participated together in off shore investments. That at one time Milton Bigalk was in that off shore investment. That later Milton Bigalk and Kenneth Bigalk were in a separate off shore investment together. That Pullman assisted Kenneth Bigalk in having protest letters sent to the IRS. That Pullman, the Kerkvliets and Milton Bigalk sponsored an Abatement seminar. That Pullman assisted Kenneth Bigalk in forwarding Abatements to the IRS. These separate and distinct acts are separated, in some cases by years, never involved all of the Defendants, but were a mishmash of different people at different times.

Evidence that some of the participants knew each other and associated in the common law system together, is not enough to prove a single conspiracy. (Similar acts by similar people, assistance by some of the same people, and knowledge of some of the participants not enough to show a common purpose or objective). There is no evidence that the participants shared a common aim or purpose and mutual dependence and assistance existed.

No evidence was presented which implicitly or explicitly joined any agreement to send the Certified Money Orders to the IRS. No evidence was developed that implicitly or explicitly showed that Pullman even knew of the actions of the Kerkvliets or Kenneth Bigalk prior to the fact, much less interacted with them to cause that action to be taken.

However the actions speak volumes to conduct which most Americans find alarming, such as reference to "militia" (Tr II 22-23). Numerous Common Law documents contain highly inflammatory statements, which heighten the danger that Pullman was convicted, not on the bases of evidence of a conspiracy to defraud the United States, but on guilt imputed to him because of the sometime outrageous acts of the common law participants. See **United States v Bledsoe, 674 F2d 647 (8th Cir 1982), cert denied 459 U.S 1040 (1982); Kotteakos v US, supra; Berger v United States, 295 U.S. 78 (1934).**

It is for the foregoing reasons of both law and facts that it is imperative that this Court make clear that in anti-government case, wherein the government uses the theory of conspiracy as its prosecution tool, instead of a substantive criminal act that the *doctrine of Strictissimi Juris should be applied.*

II. THE EIGHTH CIRCUIT ERRED IN ITS RULING OF THE STATUTORY CONSTUCTION OF 18 U.S.C.§ 513 AND ITS FAILURE TO CONSIDER THE LEGISLATIVE HISTORY OF CONCERNING THE ENACTMENT OF 18 U.S.C. § 514.

The Eighth Circuit ruled that the Montana Freeman Money Orders were counterfeit securities governed by 18 U.S.C. § 513. It rested it's holding on the language "in its entirety" 18 U.S.C. §513(c)(1), stating that Pullman ignored that plain language of the statute that covers instruments that are "made from scratch". Having found the Montana Freeman money orders to be governed by this statute the appellant court stated, "However, we need not decide the precise meaning of

18 U.S.C. §514" Pullman had argued that the money orders used in this case would have to fall under §514 "fictitious instruments". The Eighth Circuit errs in its ruling by failing to note the word "counterfeit" as used in §513. It is correct that an instrument made in it's entirety may be violative of §513, however, to be so it must also be counterfeit. Counterfeit is defined by the statute (c) (1)[1]. Further, it is defined in Black's Law Dictionary as follows:

> Counterfeit
> In criminal law. To forge; to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged for that which is original or genuine. Most commonly applied to the fraudulent and criminal imitation of money. State v McKenzie, 42 Me.392; U.S. v Barrett, D. C.N. D., 111 F369; DeRose v People, 64 Colo. 332, 171 P 359, LRA1918C, 1193; Metropolitan Nat Bank v National Surety Company., D.C. .Minn., 48 F.2d 611, 612. BLACK'S LAW DICTIONARY, Revised Fourth Edition, West Publishing Company, 1972

---

[1] (c) For the purpose of this section-

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more geniune documents;

The instruments used by Bigalk and Kerkvliet were not intimations of some genuine document, but a documents made by the Montana Freeman as a found of drawing on an account they opened at a bank in Montana. The fact that the funds were not present may be volatile of other laws, but it does not make the instrument a counterfeit security. It is preciously for that reason that Congress enacted 18 U.S.C. § 514.

The Second Circuit has ruled that money orders are securities for purposes of 18 U.S.C. §513. That issue arose in **U.S. v Thomas, 54 F3rd 73 (2nd Cir 1995),** as a result a holding in **United States v Rogers, 9 F3rd 1025 (2nd Cir 1993)** which ruled money orders were not securities under 18 U.S.C. §2311. However the Thomas Court distinguished the Rogers, by noting §2311 contained it's own definition of securities as used in that statute. In Thomas, however, once the determination that money orders were securities for purposes of § 513 the examination was able to come to an end, for it that case the involved money orders were in fact, copies of American Express money orders. They were, simply put, unauthorized copies of a genuine instrument. In the Pullman case the Montana Freeman money orders were not made to imitate any genuine document. They were "made from scratch" but represented an instrument they made as a means to draw on an account they opened at a bank in Butte Montana. The instrument was not a copy of some actual money order or draft of a financial institution, organization, entity or person. It was a fictitious documents from it's inception. **United States v O'Razvi, an unreported district court decision out of the Southern District of New York, No 97 CR., 1250, 1998 WL 405048 (S.D.N.Y.)** appears to be the only case to date that has looked at 18 U.S.C. § 514. In that case a conviction of §514 was upheld when the defendant, O'Razvi, was found to have made up instruments that purported to be Certificates of Deposit but were in reality "fictitious".

The Montana Freeman money orders were made and issued by that organization and held out by that organization as valid on an account they claim to have established at a bank, namely

Norwest Bank Anaconda-Butte, Butte Montana. They are "fictitious" but they are not forged nor are they counterfeit as defined by the statue.

Congress recognized this problem and enacted and passed 18 U.S.C. §514 to remedy the failure to have an adequate law to govern these very types of documents. The opening statements of Senator Alfonse M. D'Amato when hearings on "The financial Instruments Anti-fraud Act" S. 1009 came before the United States Senate on July 17, 1996 so clearly demonstrates this point:

> "... Over the past several years, innovative criminals have exploited a loophole in the Federal anti-counterfeiting laws. **These laws do not specifically criminalize the production or passing of a phony check, bond or security if the check, bond or security in not a copy of an actual financial instrument.** (emphasis my own) Criminals are now making and passing completely fictitious financial instruments. These instruments may involve, for example, a bank, an asset, or a security that does not even exist. We have several examples of these instruments here today..."

One of the organizations whose fictitious documents were testified about and produced as examples were the fictitious documents of the Montana Freemen. See ***Hearing before the Committee on Banking, Housing, and Urban Affairs, United States Senate, One Hundred Fourth Congress, second session on S. 1009, July 17, 1996, government document 35-783 CC, U.S, Printing Office, Washington DC, 1996.***

18 U.S.C. § 514 was enacted and became effective September 30, 1996. The issuance of these "Certified Money Orders" may most certainly have been volative of other laws, but it was not volative of 18 U.S.C.§ 513. The reason is clear,

as was testified to before Congress. To be in violation of § 513 one had to take a valid instrument and make a fake copy, or take a genuine instrument and alter it, in some way, to complete it in a manner not done by the actual maker of the instrument. It was either counterfeited, i.e. an unauthorized copy of an actual instrument or forged, i.e. falsely altered. Certificates of automobile titles, which were copies of originals or altered to contain false information, have been found to be violative of § 513. See **United States v Davis 888 F2d 283 (3rd Cir. 1989), cert granted 494 U.S. 1026, affirmed 498 U.S. 103**. Obtaining blank checks and forging a signature of the actual account holder has been found to be violative of 513. See **United States v Delia, 749 F. Supp 500 (S.D.N.Y.) affirmed 944 F2d 1010**. Altered checks wherein someone changed an amount from the actual written amount to a greater number has been found to be violative. See **United States v Blakey, 960 F2d 996 (11 Cir. 1992) appeal after new trial 14 F3d 1557**. In each and every one of these cases some actual documents was either altered or copied. In none of the § 513 cases was a document made from scratch which does not purports to be a copy of some genuine document.

The Eighth Circuit dismissed this argument and failed to look at the legislative history as meaningful.
However, the law is clear, it is presumed that "Congress "legislates with knowledge of former related statues, and will expressly designate the provisions whose applications is wishers to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction", **United States v Hansen, 772 F2d 940, 944-45 (D.C. Cir 1985), quoting Continental Ins. Co. v Simpson, 8 F2d 439, 442 (4th Cir. 1925)**. Beside the above noted fundamental principles of statutory analysis resort to secondary guideposts serve to elucidate the intended purpose and meaning of a statute. As a statute cannot be divorced from the circumstances existing at the time of its passage, the legislative history of a statute provides a certain degree of insight into the Congressional motivation behind a statute.

Akins v United States, 439 F2d 175, 194 Ct. Cl 477, 483 (1971). In **Mclean v United States, 226 U.S. 374 (1912)** this Court approved examination of Congressional reports to ascertain the Congressional intent behind a particular statue. It is also correct that it has long been held that statutes must not be construed to produce results unrelated to congressional purpose. **Steuer v United States, 207 Ct Cl. 282, 294 (1975)**.

Congress felt the need to pass 18 U.S.C. §514,
In construing a case of first impression the Court is to look to the language of the statue involved (i.e. 18 USC 513 & 18 USC 514); second to the legislative history; and third to the interpretation, if any, given by an administering agency. ***See* Brock v Writers Guild of America, West, Inc., 762 F2d 1349, 1353 (9th Cir. 1985)**. Applying this test, Appellant believes there can be no doubt that the Certified Money Orders used by Kenneth Bigalk and the Kerkvliets were not forged or counterfeit as defined by 18 USC § 513 and were exactly that type of instrument for which 18 USC § 514 was enacted.

The decision of the Eighth Circuit in the Pullman case needs to be reversed to avoid the wrongful prosecution and conviction of others under 18 U.S.C. §513, when in fact the correct application of law would require the use of 18 U.S.C. § 514.

III. WRIT OF CERTIORARI SHOULD BE GRANTED TO ELIMINATE CONFLICTING OPINIONS AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF LOSS CALCULATIONS, WHICH CONFLICTS AMOUNT TO A DENIAL OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAW

A division has developed, among the Circuits, over the proper method of determining "loss" in a fraud case. To date, the Sixth and the Tenth Circuits have held that an intended loss under § 2F1.1 cannot exceed the loss the defendant could have in fact occasioned if his or her fraud had been entirely successful. **(See, U.S. v. Kahn, 969 F.2d 218 (6th Cir. 1992)**

and U.S. v. Galbraith, 20 F.3d 1054 (10th Cir. 1992). In *Galbraith*, for example, the defendant was convicted of selling stock to a non-existent pension fund, created by the Government it a sting operation. There the defendant argued that there was no possibility of loss to a victim, and thus "the intended or probable loss was zero." The Tenth Circuit agreed, holding that "the loss defendant subjectively intended to cause is not controlling if he was incapable of inflicting that loss." *(Galbraith, id., at 1059).* In **United States v. Ensminger, 174 F.3d 1143 (10th Cir. 1999)** the 10th Circuit discussed whether a sentencing court, in calculating a defendant's sentence in a fraud case under U.S.S.G. § 2F1.1, is limited to "actual" losses occasioned by the defendant where the "intended" losses were greater but some extrinsic factor prevented the defendant from achieving the intended loss. The situation arises frequently, particularly when a defendant engages in credit card fraud but does not use up all the available credit on the stolen credit cards; or when the defendant commits a crime in response to a Government sting operation, where there is no possibility of loss to a victim. Conversely, other Circuits have held that such reasoning is wrong. In **U.S. v. Studevent, 116 F.3d 1559, 1563 (D.C.Cir. 1997)**, the Court concluded that, while "it is less than clear ... that actual loss is a dominant principle under the Guidelines", ... it held that "loss" under the Guidelines "is not limited to an amount that was possible or likely." **(See also, U.S. v. Coffman, 94 F.3d 330, 336 (7th Cir. 1996) and U.S. v. Ismoila, 100 F.3d 380, 396-97 (5th Cir, 1996)).**

In this case, the defendant was given a 13 point enhancement under the guidelines based on a "loss" calculation which equaled $3,113,090.00 (Apx). In arriving at the figure the Court held the Defendant responsible for Montana Freeman Money Orders, which were not presented, to the Internal Revenue Service or any other federal agency. In addition $1,000,000.00 of the purported "loss" is derived from the presentation of a money order to a local government clerk for a deposit in the court's registry to act as a bond, which was not required or due. Instead it was a worthless act.

It was not intending to pay an obligation or even seeking to have money paid to any person or entity. It could not be a "loss". In some Circuits the Defendant would not be assessed this One Million Dollars of loss. See, **United States v. Wells, 127 F.3d 739 (8th Cir. 1997)** and **United States v. Banta, 127 F.3d 982 (10th Cir. 1997).** Both of these cases deal with the calculation of "loss" under U.S.S.G. § 2F1.1. They prove the determination of "loss" is a mercurial and mysterious monster that often seems to be governed by the court's view of the defendant rather than on any fixed rules in the Guidelines. In **United States v. Holiusa, 13 F.3d 1043, 1044-45 (7th Cir. 1994)**, where the defendant perpetuated a Ponzi scheme by appropriating $11,625,739 from "investors" and returning approximately $8,000,000 in "interest," the district court found that the defendant intended "to defraud all of the victims of their money" and therefore held him accountable for the full $11,625,739. The Seventh Circuit reversed, holding that the full amount invested was not the probable or intended loss because the defendant did not at any point intend to keep the entire sum. Because he did not intend to and did not keep the full $11.6 million, that amount does not reflect the actual or intended loss, and is not an appropriate basis for sentencing. *Id.* at 1046; *see also* **United States v. Wolfe, 71 F.3d 611, 618 (6th Cir. 1995)** (following *Holiusa*). *Wolfe* is an example of a case in which a legitimate investment plan turned into a Ponzi scheme when the defendant's previously sound investment strategy turned sour. The Eleventh Circuit took a slightly different approach in **United States v. Orton, 73 F.3d 331 (11th Cir. 1996)**. In *Orton*, the appellate court held that the district court should only have credited payments made to "losing investors," not payments to investors who made a profit. In *Orton* the defendant had received $525,865.66 from investors and returned $242,513.65 to the investors. Twelve investors received more than they had invested; the total lost by the other investors was $391,540.01. The Eleventh Circuit adopted the loss to losing victims method in determining loss. The appellate court held that the defendant was accountable for the net losses of all victims

who lost all or part of the money they invested *Id.* at 334. The money that the defendant received from and returned to those investors who ended up with a net gain did not enter into the loss calculation. A nearly identical circumstance as the One Million Dollars issue in the Pullman case was involved in at least two cases in different Circuits. In these cases an issue arose when the defendant fraudulently deposits funds in an account, but did not withdraw them before the discovery of the fraud. The circuit courts disagree whether the fraudulently deposited funds are included in determining loss. *Compare* **United States v. Johnson, 993 F.2d 1358, 1358-59 (8th Cir. 1993) (no), with United States v. Strozier, 981 F.2d 281, 283-85 (7th Cir. 1992) (yes).**

This, your Petitioner avers, lends itself to a denial of Due Process and to the Equal Protection of Law. Note also that in, *Wells (supra)* the defendant was convicted of conspiracy and making false statements for the purpose of influencing actions of federally insured institutions. His original appeal went all the way to the Supreme Court which vacated an earlier decision of the Eight Circuit (reported at *63 F.3d 745 (8th Cir. 1995)*), holding that materiality is not an element of 18 U.S.C. § 1014. On remand, the Court principally addressed the Government's complaint that the district court (Judge Clark) had erred when it calculated the amount of loss attributable to the defendant. That court determined that the defendant did not intend to cause any loss to the banks and, therefore, found that the intended loss was zero. Because the court then found that the actual loss was $40,000, it used the greater actual loss figure to determine the extent of the base level increase under § 2F1.1

The Government contended that "intended loss" as used in § 2F1.1 is measured by the potential loss or possible loss that could arise from the charged crime, but not by the amount of the loss that the defendant intended to cause. Thus, the Government argued that since the intended loss (under its use of that term) was greater than the actual loss, that intended

loss should have been used to calculate the increase in the base offense level. In support of its position, the Government cited a number of cases, all of which are listed on page 746 of the opinion.

The Eighth Circuit rejected that argument, stating that the amount of the possible loss is just one element of proof to be considered on the issue of intended loss; and it flatly rejected the Government's position that the intended loss is always measured by the possible or potential loss. "Where the evidence is sufficient to support a sentencing court's determination that a defendant intended to cause less than the possible or potential loss that could result from the fraud, 'loss' is properly measured by the defendant's intent." *(Id., at 747).* In *Banta* the defendant purchased two vehicles, costing $49,987, on credit, which he obtained by submitting false loan applications. When he later failed to make timely payments, the vehicles were repossessed and resold at a loss of $17,962. The defendant was then indicted for bank fraud and he pled guilty. At sentencing, the court assessed a five level enhancement under § 2F1.1 on the basis of an intended loss of $49,987. The defendant argued that the court should have used the actual loss because it reflected the "economic reality" of the transaction and because collateral secured the fraudulently obtained bank loans. Thus, he argued that he could not have intended a loss for the face value of the loans because it would have been impossible for him to have inflicted such a loss. The Tenth Circuit agreed that "if it was impossible for Defendant to inflict a loss in the full amount of the loans, then he cannot be punished for that amount.

However, in the Pullman case, even in the face of direct evidence that Pullman did not know and was not involved with the forwarding of Money Orders to the Internal Revenue Service by Kenneth Bigalk, he has been charged with those checks as "loss". Even more disturbing is the fact that Bigalk did not owe the disputed tax assessment. Pullman is also charged with money orders sent by Bigalk to a private bank towards a loan repayment. When the Bank would not accept

the tendered money order's Bigalk paid the loans in legal tender. This all occurred prior to the discovery of any alleged fraud. In some Circuits this amount would not be included in the calculation of "loss".

Just as troublesome is the failure to calculate "loss" in conformity with § 1B1.3(a)(2)'s references to "same course of conduct" and "common scheme or plan". See **United States v Perdemo 927 F2d 111, 114-115 (2nd Cir. 1991); United States v Santiago 906 F2d 867, 872 (2nd Cir. 1990)**. With total disregard for this dictate of the law, the "loss" calculation was allowed to include possession of Montana Freeman money orders which were not directed to the United States and which were not utilized in any alleged course of conduct or common scheme or plan which was supposed to be part of the conspiracy Pullman participated in as claimed by the government.

To allow the Eighth Circuit's acceptance of an all-inclusive "loss" calculation is tantamount to a violation of Pullman's rights of due process and equal protection of the law.

IV. IS IT CONSTITUTIONALLY PERMISSIBLE TO ALLOW A 2 POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE ON THE BASIS OF CONFLICTING BUT NOT MUTALLY EXCLUSIVE TESTIMONY?

The government based its request for an upward adjustment upon Appellant's choice to testify at the trial and to have made a statement that in July of 1995 he was forcibly escorted off the property of the Montana Freeman when he protested the Certified Money Orders. The government in essence argued that such testimony was false and constituted perjury. At the time of the Appellant's sentencing the government introduced portions of tape recordings claiming that such recording would indicate that there was no hostility and therefore the Appellants testimony at trial must be false. Based on this the lower court found (without so stating) that Pullman had perjured himself, and enhanced his sentence. This Court has

addressed the issue of enhancement based on perjury and found it to be a constitutionally permissible statute, see **United States v Dunnigan, 507 U.S. 87 (1993)**. However, in so ruling this Court stated that the protection for the accused was that the trial court would have to adhere to a finding that all of the elements of perjury exists and that such finding must be made with specificity.

The fact that the prosecution, and ultimately the jury, did or did not believe the Appellant on this fact does not rise to the level of obstruction of justice by perjury. The definition of perjury under the Sentencing Guidelines is the same as that which obtains under the substantive federal criminal law. It contains three elements: (1) false testimony (2) concerning a material fact or matter (3) given with the willful intent to deceive (rather than as a result of confusion, mistake or faulty memory. The government cannot secure a sentencing enhancement on the grounds of perjury unless it proves each of the foregoing elements by a preponderance of the evidence. An obstruction enhancement does not apply automatically every time a criminal defendant who testifies is convicted. **United States v Smith, 62 F 3d 641, 646-647 (4th Cir 1995)**.

The introduction of the tape recordings by the government at the Pullman's sentencing was not so compelling that it completely contradicts Pullman's trial testimony. In addition his former wife, who was present, corroborated his trial testimony. Pullman also informed the Court that there was another witness he wanted to call who would corroborate his testimony on this matter. There also is a need to determine whether the alleged false testimony was material. **United States v Parker, 25 F3d 442, 448 (7th Cir 1994)**. It follows, therefore, that no enhancement may be imposed for testimony, allegedly perjurious, that would not tend to influence or affect the issue, even were it believed. **See United States v Hilliard, 31 F3d 1509, 1520 (10th Cir. 1994)**. Likewise if a reasonable trier of fact could find the testimony true, no enhancement should apply. See **United States v Willis, 940 F2d 1136, 1140 (8th Cir. 1991)**. Furthermore the District Court did not make any finding of how this allegedly material

testimony significantly obstructed or hindered the prosecution. See **United States v Alpert, 28 F3d 1104, 1107-1108 (11th Cir. 1994); United States v Robinson, 978 F2d 1554, 1566 (10th Cir. 1992); United States v Williams, 952 F2d 1504, 1515-1516 (6th Cir. 1991)**. This is mandatory upon the District Court as the term "willfully implies a *mes rea* requirement. See **United States v Reed, 49 F3d 895, 900 (2nd Cir. 1995)**. The enhancement of a sentence is appropriate only where the Court is able to find that Appellant "had specific intent to obstruct justice". See **United States v Defeo, (2nd Cir. 1994) supra; United States v Gardner, 988 F2d 82, 83-84 (9th Cir. 1993); United States v Belletiere, 971 F2d 961, 965-966 (3rd Cir 1992); United States v Tabares, 951 F2d 405, 410 (1st Cir. 1991); United States v Romulus, 949 F2d 713, 717 (4th Cir. 1991), cert denied 503 U.S. 992 *(1992)***.

U.S.S.G. § 3C1.1, App. Note 1, in fact, requires that the evaluation of the testimony of the accused must be made in the light most favorable to him. To fail to adhere to these standards should be viewed as unconstitutional. The Circuits appear to be confused as to the proper application of U.S.S.G. § 3C1.1 and it is presently being applied inconsistently circuit to circuit. A clear mandate is needed to assure there is no chilling effect of the accused rights to testify.

CONCLUSION

For the foregoing reasons the Court should grant this Petition For Writ Of Certiorari.

Respectfully Submitted,

George Z. Petros
Counsel of Record
5849 Allentown Road
Camp Springs, MD 20746
(301) 423-1000

APPENDIX

A- 1	Court of Appeals Opinion
A-15	Judgment of District Court
A-17	Extract of Pullman Sentencing Guidelines
A-18	U.S.S.G. 2F1.1
A-20	18 U.S.C. 513
A-22	18 U.S.C. 514

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No.98-3251

United States of America,

Plaintiff - Appellee,
v.

Appeal from the United States District Court for the District of Minnesota.

Marvin L. Pullman, also known as Dick Pullman,

Defendant - Appellant.

Submitted: May 11, 1999

Filed: August 13, 1999

Before RICHARD S. ARNOLD, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

JOHN R.GIBSON, Circuit Judge.

Marvin Pullman appeals his conviction and sentence on three counts, conspiracy to commit offenses against or to

defraud the United States, see 18 U.S.C. § 371(1994), aiding and abetting another in possessing or uttering a counterfeited security, see 18 U.S.C. § § 2 and 513 (1994), and aiding and abetting the obstruction of the Internal Revenue Service, see 18 U.S.C. § 2; 26 U.S.C. § 7212 (1994). Pullman, Marilyn Kerkvliet, and Milton Bigalk attended a meeting of the Montana Freemen, where the use of worthless certified money orders was discussed, and Marilyn Kerkvliet, Ronald Kerkvliet (Marilyn's husband) and Kenneth Bigalk (Milton's cousin) submitted such money orders to the I.R.S. in payment of taxes. There was also evidence of use of such money orders with state institutions, and evidence that Pullman participated with the others in filing a false tax return, setting up a fraudulent trust, investing in off-shore accounts, and sending threatening "non-statutory abatements" to the I.R.S. Pullman raises ten issues on appeal. Only his challenge to the conspiracy conviction and his interpretation of 18 U.S.C. § 513 warrant substantial discussion, and we affirm the district court' [1] on all issues raised.

Pullman challenges the sufficiency of the evidence on his conspiracy conviction. We view the evidence in a light most favorable to the verdict, giving the verdict the benefit of all reasonable inferences, and will reverse only if the jury must have had a reasonable doubt concerning one of the essential elements of the crime. See United States v. McCarthy, 97 F.3d 1562, 1567 (8th Cir. 1996), cert. denied, 519 U.S. 1139 (1997).

Pullman testified that he became acquainted with Marilyn Kerkvliet, Ronald Kerkvliet, Milton Bigalk, and Kenneth Bigalk in 1991 through 1995. Pullman initially met Milton

---

[1] 'The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

Bigalk at a sales meeting and later saw him at a meeting concerning tax problems in Canton, Minnesota. Pullman met the Kerkvliets at a "common law" meeting in Dover, Minnesota. Pullman had previous experience with tax and bankruptcy problems and acted as a consultant for Kenneth Bigalk.

In April 1995, Pullman, Milton Bigalk, and Marilyn Kerkvliet traveled together to a Montana Freemen meeting hosted by Leroy Schweitzer. A government agent testified that Schweitzer had a practice of holding seminars in which he instructed the attendants on defrauding the I.R.S. with money orders. The money orders appeared to be drawn on a Montana Bank, but in fact, were worthless. A taxpayer would send a money order to the I.R.S. in an amount double the taxes owed, and when the I.R.S. issued a refund check for overpayment, the proceeds were to be split with Schweitzer. Pullman testified that at the meeting he heard Daniel Petersen, Schweitzer's assistant, state, "the I.R.S. [is] going to arrest all of us." The government entered into evidence tape recordings of the meeting seized from Pullman's business. The recordings showed that at the meeting, Pullman stated that using the money orders was "like playing Monopoly" and that if "we run out, we'll just go make some more." He also stated that he had previously been involved in distributing money orders that had "created havoc" in Washington D.C. At the meeting, Petersen also explained that the money orders had been used to deceive a private entity.

After the meeting, Milton Bigalk gave money orders to Kenneth Bigalk, and the Kerkvliets and Kenneth Bigalk submitted money orders to the I.R.S. in amounts roughly double their tax liability. Kenneth Bigalk submitted another money order to the I.R.S. in the amount of $1,022,236. Pullman possessed a $1,000,000 money order but never submitted it to the I.R.S. or any other entity.

The bank notified the I.R.S. that the money orders were worthless, and the I.R.S. did not credit or refund any proceeds. Milton Bigalk then sent a letter to the I.R.S. reciting that Marilyn Kerkvliet had sent a money order to the I.R.S., that the money order was in accordance with the I.R.S.'s own rules, and that the I.R.S.'s denial of the money order had been "protested." Milton Bigalk also talked to Kenneth Bigalk about sending a letter to the I.R.S. to expedite Kenneth's refund, and Kenneth wrote the letter. Pullman knew that the Kerkvliets and Kenneth Bigalk had sent money orders to the I.R.S., yet he continued to visit Schweitzer and sent him a letter asking for more money orders and indicating that he would funnel them through Marilyn Kerkvliet to Milton Bigalk and others. The evidence was unclear regarding how these money orders were to be ultimately used.

In August 1995, Pullman knew Ronald Kerkvliet had a $1,000,000 money order and knew that Kerkvliet was going to use the money order as security to become a state notary, yet Pullman notarized an affidavit in attempt to facilitate the process. A computer disk seized from Pullman's house contained a partially completed document, similar to the "protest letter" Milton Bigalk had sent to the I.R.S., except that it referenced Kenneth Bigalk's tender of a "draft" in the amount of $223,518 to the "Farmers Cooperative."

Pullman, the Kerkvliets, and Milton and Kenneth Bigalk formed corporations for investing money in off-shore accounts, and the Kerkvliets gave Pullman a power of attorney with regard to transactions for one of the corporations. Pullman, Milton Bigalk, and Marilyn Kerkvliet organized a seminar on how to use "non-statutory abatements," and Pullman gave an abatement to Kenneth Bigalk, who sent it to the I.R.S. The abatement threatened the I.R.S. with punishment if it did not rescind its notice to levy on Bigalk. Pullman also helped Kenneth Bigalk in

Bigalk's efforts to "buy time" with the I.R.S. He helped Bigalk set up a trust, assisted in the preparation of an income tax return falsely reporting Bigalk's trust's income as zero, and notarized a document stating that Kenneth Bigalk was not a United States citizen.

The indictment charged Pullman, the Kerkvliets, Milton Bigalk, and Kenneth Bigalk with conspiring with each other and others in violation of 18 U.S.C. § 371 which penalizes "two or more persons [who] conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose...." The conspiracy count alleged a conspiracy to make false claims to the I.R.S., see 18 U.S.C. § 287, to possess or utter a counterfeited security of an organization, see 18 U.S.C. § 513, and to commit mail fraud, see 18 U.S.C. § 1341. It also alleged a conspiracy to defraud the United States under the second clause of 18 U.S.C. § 371. In defining the manner and means of the conspiracy, the indictment alleged that Schweitzer prepared and executed the money orders,[2] that the defendants possessed them and sent them to the I.R.S., and that the defendants participated in an off-shore investment scheme, created fraudulent trusts and income tax returns, and used intimidating documents to defraud and obstruct the I.R.S. The indictment also contained counts for making false claims to the I.R.S., aiding and abetting the possession or utterance of counterfeited securities, and aiding and abetting the obstruction of the I.R.S. The jury convicted Pullman on conspiracy to commit offenses against or to defraud the United States, aiding and abetting the possession or utterance of a counterfeited security, and aiding and abetting the obstruction of the I.R.S.

---

[2]Schweitzer was not indicted.

I.

With respect to the conspiracy conviction, Pullman claims there was no evidence of his agreement to defraud the I.R.S. He argues that there is no evidence connecting him to the mailing of any money orders to the I.R.S. He characterizes the evidence as evidence of separate acts, which he states perhaps establish multiple conspiracies, in none of which he participated. He makes no effort to identify or define the separate conspiracies. See, ~ United States v. Holt, 969 F.2d *685,* 687 (8th Cir. 1992) (defendants alleged four separate conspiracies). In essence, his argument is twofold: 1) there is not sufficient evidence from which the jury could conclude he agreed to defraud the United States and 2) the evidence showed multiple conspiracies, rather than the single conspiracy charged in the indictment, and he was prejudiced by the variance between the indictment's charge and the proof.

"Conspiracy is an... agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777 *(1975).* "[T]he agreement is the essential evil at which the crime of conspiracy is directed," and it "serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact." Id. at 777 n. 10. The agreement can be inferred from circumstantial evidence. See id. "Once a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient to prove the defendant's involvement." United States v. Smith, 49 F.3d 362, *365* (8th Cir.) (quoting United States v. Ivey, 915 F.2d 380, 384 (8th Cir. 1990), cert. denied, 514 U.S. 1131(1995).

The evidence and its reasonable inferences showed that Pullman, Marilyn Kerkvliet, and Milton Bigalk attended a meeting in which Schweitzer told them of a scheme to defraud the I.R.S. using money orders. Pullman knew of the scheme's object because of Schweitzer's instructions and

because he heard that the I.R.S. was seeking to arrest Schweitzer and others. Pullman showed his consent to join by stating: "[If] we run out [of money orders], we'll just go make some more. "[3] Pullman later possessed a money order signed by Schweitzer and continued to contact Schweitzer regarding money orders knowing that his co-conspirators had sent them to the I.R.S. He did not send any money orders to the I.R.S., but that fact alone does not negate a claim of conspiring to defraud the I.R.S.

Placing to one side the evidence unrelated to the money orders, there is ample evidence supporting Pullman's agreement to defraud the I.R.S., and we could hardly say there was not the "slight" evidence necessary to connect Pullman to the established conspiracy amongst the Kerkvliets and Milton and Kenneth Bigalk. See Smith, 49 F.3d 362, 365 (8th Cir. 1995).

Pullman also overlooks the fact that the indictment charged a conspiracy with multiple objectives, including defrauding the I.R.S. and deceiving other entities with counterfeited securities in violation of 18 U.S.C. § 513. Viewing the conspiracy in this light, the evidence clearly supports Pullman's participation in the conspiracy. In addition to agreeing to join the conspiracy at the meeting, where the participants discussed how the money orders had been used to deceive a private institution, Pullman helped both Ronald Kerkvliet and Kenneth Bigalk in their attempts to pass the money orders to Dakota County and the Farmers Cooperative.

---

[3]Although the statement did not reference the I.R.S. and was not made n response to any comments about the I.R.S., the jury could still have reasonably inferred Pullman's consent to defraud the I.R.S. considering the nature of the meeting.

Pullman argues that the indictment charged a single conspiracy, but the government proved multiple conspiracies. We reverse on such a claim if the evidence does not support the single conspiracy and the defendant was prejudiced by the variance between the indictment and the proof. See United States V. Rosnow, 977 F.2d 399, 406 (8th Cir. 1992), cert. denied, 507 U.S. 990 (1993); United States v. Massa, 740 F.2d 629, 636 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

Whether there are multiple conspiracies or a single one is question of fact for the jury to decide. See United States v Jenkins, 78 F.3d 1283, 1288 (8th Cir. 1996). The jury determined that a single conspiracy existed after being properly instructed that they were not to convict unless the government proved the single conspiracy alleged in the indictment. We look to the totality of the circumstances to determine whether a single conspiracy or multiple conspiracies existed and give the verdict the benefit of all reasonable inferences that can be drawn from the evidence. See United States v.McCarthy, 97 F.3d 1562, 1570 (8th Cir. 1996). "[T]o prove a single conspiracy it is not necessary to show that all the conspirators were involved in each transaction or that all the conspirators even knew each other." Rosnow, 977 F.2d at 405. "A single conspiracy may be found when the defendants share a common overall goal. . ." McCarthy, 97 F.3d at 1571 (quoting United States v. Darden, 70 F.3d 1507, 1518(8th Cir. 1995)). "It is sufficient that the jury finds the co-conspirators were aware of the general nature and scope of the conspiracy and knowingly joined in the overall scheme." United States v Zimmermen, 832 F.2d 454, 457 (8th Cir. 1987).

Pullman offers no specific analysis identifying or defining the multiple conspiracies. Instead, he makes general arguments: the government adduced evidence of numerous separate acts, and perhaps of separate criminal conspiracies,

none involving Pullman; the government presented evidence of multiple acts with no nexus between the parties; Pullman had no knowledge that the Kerkvliets or Kenneth Bigalk sent money orders to the I.R.S. or that they had tax assessments before using the money orders; Pullman had no role in the others' decisions to use money orders; Pullman's relationship with Kenneth Bigalk was merely that of "paralegal/client"; the evidence regarding the "non-statutory abatements" was not tied to a single agreement between the defendants; the only connection between the defendants was the use of the money orders; and the government relied only on evidence of common association.

Pullman's assertions are belied by the record, and are mostly irrelevant to the question. They merely restate his contention that there was no conspiracy. We reject his contention that we should reverse because of a prejudicial variance between the indictment's charge and the proof.

We have set out above in some detail Pullman's contacts with the Kerkvliets and Milton and Kenneth Bigalk and his knowledge of their actions. Pullman, Marilyn Kerkvliet, and Milton Bigalk were present at the Montana Freemen meeting together. Pullman's statement at the meeting, using the pronoun "we," displays common action and purpose. Within a few weeks of the meeting, money orders were submitted to the I.R.S., and within a few months, Pullman was contacting Schweitzer regarding more money orders to be used by Milton Bigalk, and was helping co-conspirators in their attempts to pass money orders to other institutions. Meanwhile, Milton Bigalk wrote letters to the I.R.S. stating that Marilyn Kerkvliet's money order had been sent in and conformed with I.R.S.'s rules, and encouraged Kenneth Bigalk to write letters to the I.R.S. to expedite his refund. See McCarthy, 97 F.3d at 1571 (time frame in which acts occurred and whether acts facilitated endeavors of other conspirators considered in single conspiracy determination).

The co-conspirators also took actions unrelated to the money orders, some of which occurred in 1996 and 1997. However, any claim of Pullman's that these acts constituted separate conspiracies is of no aid to him because he participated in each conspiracy, which forecloses a claim of prejudicial variance. See United States v. Zimmermen, 832 F.2d 454, 457 n.2 (8th Cir. 1987). The evidence showed that Pullman participated in the money order scheme, the off-shore investment scheme, the sending of "non-statutory abatements" to the I.R.S., the construction of Kenneth Bigalk's fraudulent trust, and the filing of the false income tax return.

II.

Pullman also claims that the money orders are not "counterfeited" securities under 18 U.S.C. § 513; therefore, he contends his conviction for aiding and abetting the possession or utterance of counterfeited securities cannot stand. He argues that 18 U.S.C. § 514 (Supp. II 1996),[4]

---

[4]18 U.S.C. § 514 states:

(a) Whoever, with the intent to defraud--

(1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the same, within the United States;

(2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States; or

(3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio, or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States, any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the Untied States, or an organization, shall be guilty of a class B felony.

(b) For purposes of this section, any term used in this section that is defined in section 513(c) has the same meaning given such term in

which he was not charged with violating, defines the offense he committed. He argues that the legislative history of 18 U.S.C. § 514 shows that it is the applicable statute when someone makes up a security "from scratch," rather than altering a genuine security. He relies on a Senate hearing before the Committee on Banking, Housing, and Urban Affairs in which Senator D'Amato stated that 18 U.S.C. § 514 was being passed because criminals "exploited a loophole" in the federal anti-counterfeiting law by "making and passing completely fictitious financial instruments." The Financial Instruments and Anti-Fraud Act: Hearings on S. 1009 Before the Senate Comm. on Banking. Housing. and Urban Affairs, 104th Cong. 1 (1996) ("Hearing"). He also points out that Leroy Schweitzer and the Montana Freemen were mentioned at the hearing as examples of those 18 U.S.C. § 514 was intended to stop. See Hearing at 2.

We reject Pullmans argument. 18 U.S.C. §513 penalizes the making, uttering, or possessing with intent to deceive a "counterfeited" security of an organization. See 18 U.S.C. § 513(a). It specifically defines "counterfeited" as "a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety ..." 18 U.S.C. § 513(c)(l) (emphasis added). Pullman's brief ignores that the plain language of 18 U.S.C. § 513 covers instruments that are "made from scratch" and instead replaces the statute's definition of "counterfeited" with its definition of "forged. "[5]

---

section 513(c)....

[5]18 U.S.C. § 513 also penalizes the making, uttering, or possession with intent to deceive of a "forged" security. It defines "forged" as "a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents." 18 U.S.C. § 513(c)(2).

There is no language in 18 U.S.C. § 514 which indicates that instruments that are falsely made in their entirety are not "counterfeited" securities as defined in 18 U.S.C.§ 513, and indeed, Pullman makes no argument based upon the plain language of 18 U.S.C. § 514.

Pullman relies on the statements in the Senate hearing in his interpretation of 18 U.S.C. § 513. The statements are of little value, see United States v. Price, 361 U.S. 304, 313 (1960) (views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one), and are equivocal The participants mentioned Schweitzer and the Montana Freemen, but did not refer to the instruments at issue in this case. See Hearing at 2 ("comptroller warrants" and "phony notes"). While the statements at the hearing may lend some support to Pullman 5 argument, they more than once suggest that 18 U.S.C. § 513 covers instruments, whether they be alterations of genuine documents or falsely made in their entirety, which are drawn on or purport to be drawn on existing financial institutions (the kind Pullman used), while 18 U.S.C. § 514 covers instruments drawn on financial institutions that do not exist or wholly nonexistent types of instruments. See Hearing at 1, 12, 18, 23. However, we need not decide the precise meaning of 18 U.S.C. § 514, a point neither party briefs. Neither the plain language of 18 U.S.C. § 514, nor its legislative history, persuades us that the money orders at issue do not fall within the ambit of 18 U.S.C. § 513.

III.

Pullman also argues that 1) there was insufficient evidence to sustain the conviction for aiding and abetting another in the possession or utterance of a counterfeited security, and 2) there was insufficient evidence to sustain the conviction for obstructing and impeding the I.R.S.

The evidence was sufficient to convict Pullman for aiding and abetting the possession or utterance of a counterfeited security. See 18 U.S.C. §§ 2 and 513. Pullman admitted that he notarized an affidavit knowing that Milton Bigalk was going to use the affidavit and a money order, which Pullman knew was worthless, in attempt to become a notary. The affidavit and money order were submitted to Dakota County personnel.

The evidence was sufficient to sustain the conviction for aiding and abetting the obstruction of the I.R.S. See 26 U.S.C. § 7212 (penalizing use of corruption, force, or threat of force to obstruct the administration of Title 26); 18 U.S.C. § 2; United States v. Williams, 644 F.2d 696, 701(8th Cir.) (physically assisting the filing of false tax forms constitutes violation of 26 U.S.C. § 7212), cert. Denied, 454 U.S. 841(1981). Among other things, Pullman helped Kenneth Bigalk prepare a tax return, falsely reporting Bigalk's trust's income as zero.

IV.

Pullman argues that 1) the district court erred in admitting evidence of coconspirators' statements and documents; 2) the district court erred in admitting tape recordings into evidence; 3) the doctrine of strictissimi juris applies to his case; and 4) the district court erred in its application of U.S.S.G. §§ 2F1.l(b)(1), 3B1.1(a), and 3C1.1.

We detect no abuse of discretion in the district court's admission of evidence. The district court followed the proper procedure in admitting the evidence of coconspirators' statements and documents, and the record supports its finding of a conspiracy. See United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (outlining procedure for admission of coconspirators' statements). We reject Pullman's contention that certain evidence, including

material on the tape recordings, was irrelevant.

We have carefully considered all of Pullman's other arguments and conclude they are without merit.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

A-15

UNITED STATES DISTRICT COURT
Fourth Division – District of Minnesota

UNITED STATES OF AMERICA

Case No. CR 97-278
(ADM/FLN)

v.

MARVIN L. PULLMAN
Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, MARVIN L. PULLMAN, was represented by Lawrence Crosby.

The defendant was found guilty on counts 1, 6, 8 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC §371	Conspiracy to Defraud the United States	04/95-into 1997	1
18 USC §513(a)	Possession of Counterfeit Securities	08/26/95	6
26 USC§7212(a)	Obstruct and Impede the IRS	Prior to 07/94 up to 05/97	8

As pronounced on 08/21/98, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $300. for counts 1, 6, 8, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid.

Dated: August 21, 1998

/S/
Ann D. Montgomery
United States District Judge

Defendant's SSAN: 433-50-9005
Defendant's Date of Birth: 12/01/42
Defendant's address: 524 West Main Street,
P. O. Box 206, Elma, Iowa 50628

Extract from Pullman's Sentencing Guidelines:

Counts 1 and 6 – Conspiracy to Defraud the United States/Counterfeit Securities

53. Base Offense Level: The guideline for a violation of 18 U.S.C.§§ 371 and 513(a) is found in §2F1.1 of the Guidelines. The base offense level is 6 §2F1.1(a).

Level 6

54. Specific Offense Characteristics: If the intended loss the defendant was attempting to inflict is greater than the actual loss, the intended loss figure is to be used in calculating the offense level. §2F1.1, Application Note 7. In accordance with §1B1.3(a)(2), the defendant is accountable for his acts and all reasonably foreseeable acts of his codefendants were part of the same course of conduct or common scheme or plan as the offense of conviction. The defendant conspired and aided codefendants in attempting to inflict a total loss of $3,113,090. The total loss figure consists of the following: on May 15, 1995, fraudulent money orders in the amount of $300,000 was submitted, on May 17, 1995 a fraudulent money order in the amount of $390,854 was submitted; on August 26, 1995, a fraudulent money order was submitted for $1,000,000; on July 18, 1995, a fraudulent banker's check was submitted for $400,000. Because $3,113,090 is more than $2,500,000 but not more than $5,000,000, a 13-level increase is warranted. §F1.1(b)(1)(N).

Level +13

60. Adjustment for Obstruction of Justice: The defendant testified falsely at trial, which was deemed significant further obstruction during the prosecution of the case as well as distinct from the obstructive behavior described in Count 8 of the Indictment. A 2-level increase is warranted. §3C1.1

Level +2

§ 2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States.

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18

(2) If the offense involved (A) more than a minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a

(4) government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process nto addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(B) If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(B) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

(B) If the offense—

(B) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

18 United States Code § 513.
Securities of the States and private entities

(a) Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both.

(b) Whoever makes, receives, possesses, sells or otherwise transfers an implement designed for or particularly suited for making a counterfeit or forged security with the intent that it be so used shall be punished by a fine under this title or by imprisonment for not more than ten years, or both.

(c) For purposes of this section-

(1) The term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety.

(2) The term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents:

(3) The term "security" means-

(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement, collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;

(B) an instrument evidencing ownership of goods, ware, or merchandise;

(C) any other written instrument commonly known as a security;

(D) a certificate of inters in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or

(E) a blank form of any of the foregoing;

(4) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association pf persons which operates in or the activities of which affect interstate or foreign commerce; and

(5) the term "State" includes a State of the United States, the District Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

(Added Pub.L. 98-473, Title II, § 1105(a), Oct. 12, 1984, 98 Stat 2144; § 555: renumbered § 513, Pub.L. 99-646, § 31(a), Nov. 10, 1986, 100 Stat. 3598, and amended Pub.L. 101-647, Title XXXV, § 3515, Nov. 29, 1990, 104 Stat. 4923; Pub.L. 103-322, Title XXXIII, §§ 330008(1), 330016(2)(C), Sept. 13, 1994, 108 Stat. 2142, 2148.)

18 United State Code § 514.
Fictitious obligations

(a) Whoever, with the intent to defraud-

(1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the sane, within the United States;

(2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States; or

(3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States,

any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization, shall be guilty of a class B felony.

(b) For the purposes of this section, any term used in this section that is defined in section 513(c) has the same meaning given such term in section 513(c).

(c) The United States Secret Service, in addition to any other agency having such authority, shall have authority to investigate offenses under this section.

(Added Pub.L. 104-208, Div. A, title I, § 101(f) [Title VI, § 648(b)(1)], Title II, § 2603(b)(1), Sept. 30, 1996, 110 Stat. 3009-367, 3009-470.)